Supreme Court, U.S.
FILED
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No. 02-1578

In the Supreme Court of the United States

CONRAIL C/O TRANSPORTATION DISPLAYS, INC.,
Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), THE CENTER CITY RESIDENTS ASSOCIATION, MARY CRAWLEY TRACY, PHILADELPHIA COUNCILWOMAN ANNA VERNA AND PHILADELPHIA COUNCILMAN DAVID COHEN
AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner waived the issues presented for review by not raising the issues in the lower courts?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner, Conrail c/o Transportation Displays, Inc., was the Appellant below.

The represented Respondents who were the Appellees below are as follows:

Society Created to Reduce Urban Blight (SCRUB)

The Center City Residents Association

Mary Crawley Tracy

Philadelphia Councilman Anna Verna

Philadelphia Councilman David Cohen

There is no parent corporation. Society Created to Reduce Urban Blight (SCRUB) is a non-profit corporation, which has 501(c)(3) status with a business address of 1314 Chestnut Street Suite 750, Philadelphia, Pennsylvania, 19107.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding and
Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 5

TABLE OF AUTHORITIES

Case	Page
Hertzberg v. Zoning Board of Adjustment, 21 A.2d 43 (Pa., 1998)	4

Statement of the Case

The Petitioner, Conrail c/o Transportation Displays, Inc., has petitioned for a Writ of Certiorari to this Honorable Court from the January 28, 2003 Order of the Supreme Court of Pennsylvania denying the Petition for Reconsideration of the Order of the Supreme Court of Pennsylvania dated November 20, 2001 denying the Petition for Allowance of Appeal. (1A-4A) The issues presented by the Petitioner were not raised in the Courts below and were waived.

The Petitioner wished to place large double-faced "V" shaped signs on property owned by Conrail and actively used for rail lines.

The procedural history is as follows: In 1989, Conrail had applied to the Philadelphia Department of Licenses and Inspections to obtain permission for the erection of four outdoor advertising signs on the property in question. The Philadelphia Department of Licenses and Inspections determined in 1989 that the advertising signs were not permitted since the area was zoned as recreational. No timely appeal was taken by Conrail.

In March 26, 1999, Conrail filed four separate applications for use permits to erect four double-faced V shaped signs. These signs were in direct violation of Philadelphia Zoning Ordinance 14-1604. These signs were located within 660 feet of major highway I-95. Three of the signs were located within 660 feet of a park and recreational facility. Two of the signs would be within 660 feet of a park within the Fairmount Park Commission. The Petitioner did not remove any existing signs. All of the above were areas

where signs were prohibited by Philadelphia Zoning Ordinance 14-1604.

The property in question was near the old Philadelphia Naval Yard. The property had two very active rail lines.

The application for these four signs were denied by the Philadelphia Department of Licenses and Inspections. The Petitioner then appealed to the Zoning Board of Adjustment in Philadelphia. A hearing before the Zoning was held on May 12, 1999. On July 6, 1999, the Zoning Board of Adjustment granted the variances for the four large billboard signs.

The Respondents, SCRUB, et al., filed an appeal in the captioned matter to the Court of Common Pleas of Philadelphia County on July 30, 1999. The only issue on appeal raised by the Respondents was whether the grant of the variance was an abuse of discretion. No cross appeal was filed.

A hearing was held on January 12, 2000, before the Honorable Stephen Levin of the Court of Common Pleas of Philadelphia County. On May 26, 2000, Judge Levin reversed the grant of the variances for the four billboard signs.

The Petitioner then filed a timely appeal to the Commonwealth Court of Pennsylvania. Oral argument was held in the Commonwealth Court. By Opinion dated April 26, 2001, the Commonwealth Court affirmed the decision of the Court of Common Pleas. (5A) The Commonwealth Court found there was no hardship to justify the variance. (13A)

The Petitioner then sought a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. This request was denied by the Pennsylvania Supreme Court by Order dated November 20, 2001. (4A) The Petitioner then sought reconsideration of the aforementioned denial. By Order dated January 28, 2003, the Pennsylvania Supreme Court denied the Petition for Reconsideration. (2A)

The Petitioner now has filed the present Petition for Writ of Certiorari.

Reasons for Denying the Writ

The Respondent, Society Created to Reduce Urban Blight (SCRUB), et al. respectfully request the Petition for Writ of Certiorari be denied since the Petitioner, Conrail, has waived the issues presented for review by not timely raising the issues in the lower courts.

The appeal from the Zoning Board of Adjustment by the Respondents raised only one issue. The issue in essence was whether the grant of the variance was a gross abuse of discretion since there was not hardship and the signs were against public policy. The signs were absolutely prohibited by Philadelphia Zoning Ordinance 14-1604. No cross appeals were taken by the Petitioner.

In the Brief filed by the Petitioner in the Commonwealth Court, the issues presented for review were as follows:

1. Whether the recreational zoning classification of the property at issue in this matter is effectively a nullity because the property, by definition, cannot

meet the express requirements of the Philadelphia Zoning Code to be zoned recreational.

2. Whether requests for variances from the Zoning Code's limitations on placement of outdoor advertising signs should be analyzed under the standards for dimensional variances set forth by the Pennsylvania Supreme Court in Hertzberg v. Zoning Board of Adjustment, 21 A.2d 43 (Pa., 1998).

3. Whether the Zoning Board properly granted Appellant variances to erect outdoor advertising signs where substantial evidence supported the Board's findings that if the variances were denied Appellant would suffer an unnecessary hardship that was not created by Appellant and that the variances would not adversely affect public health, safety and welfare. (A278, A279)

The first two issues were not raised below in the Common Pleas Court since the Petitioner had not filed a cross appeal.

Further, these issues are different than the issues being framed in the present Petition for Writ of Certiorari.

1. Is the enforcement of a zoning classification that is erroneous on its face a violation of due process and taking clauses of the United State Constitution?

2. Under the due process and taking clauses of the United State Constitution, should the burden for obtaining a dimensional variance be different from and lower than the burden for obtaining a use variance?

These issues were not raised on any cross appeal by the Petitioner in the Court of Common Pleas of Philadelphia County. They also are different from the issues framed in the Commonwealth Court by the Petitioner.

This Honorable Court should deny the present Petition for Writ of Certiorari since the issues were not properly presented in the Courts below and were therefore waived.

Conclusion

The Respondents, SCRUB, et al., respectfully requests the Petition for Writ of Certiorari be denied since the issues were waived by not timely or properly raising the issues in the lower courts.

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